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May 18, 2010

Re: National Climate Coalition's Comments on Draft NEPA Guidance on  
Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

Dear Ms. Sutley:

The National Climate Coalition ("NCC") submits these comments to the Council on Environmental Quality's ("CEQ's") "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions" ("Draft NEPA GHG Guidance") on behalf of its members, companies doing business in many industry sectors that will be directly impacted by greenhouse gas ("GHG") regulation, including aerospace, consumer products, electronics, general manufacturing, and electric power generation.<sup>1</sup>

Because stabilizing the concentrations of GHGs in the atmosphere will require the transformation of our energy, transportation and manufacturing systems, the NCC believes that Congress should craft national climate legislation that balances multiple additional national priorities, and that assigns responsibility across federal departments and agencies according to their respective expertise. The NCC recognizes, however, that while Congress works to enact federal legislation, CEQ has chosen to proceed with Draft NEPA GHG Guidance and the Environmental Protection Agency ("EPA") has chosen to proceed with a suite of recent rulemakings that relate to GHG emissions. CEQ's Draft NEPA GHG Guidance and EPA's rulemakings, *if structured appropriately and designed to avoid harmful impacts*, may,

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<sup>1</sup> The NCC submits these comments in conjunction with prior comments submitted to EPA on its: (1) "Advance Notice of Proposed Rulemaking for Regulating Greenhouse Gas Emissions Under the Clean Air Act ANPR;" (2) "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act;" (3) Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards;" (4) the "Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program Rule;" and (5) "Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Proposed Tailoring Rule").

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individually and together provide a useful national framework for federal actions that could avoid difficulties likely to arise under the developing patchwork of state and regional regulatory programs. These federal efforts may also assist Congress in crafting appropriate national legislation.

In this context, the NCC believes that it is critical for CEQ to work with EPA and other federal agencies to promote thoughtfully designed policy initiatives and to revise its Draft NEPA GHG Guidance to be consistent with those policy initiatives and to avoid potentially detrimental results. To that end, the NCC urges CEQ to clarify in its Final NEPA GHG Guidance that such guidance in no way alters, amends or replaces existing laws and regulations, including, but not limited to, existing categorical or other exemptions from NEPA requirements. While CEQ makes this point in general terms at the conclusion of its Draft NEPA GHG Guidance, we believe it is important to underscore it with specific reference to existing statutory and categorical exemptions.<sup>2</sup>

Further to this point, for avoidance of doubt, we believe that CEQ also should remove from its Draft NEPA GHG Guidance all references to thresholds established under the Clean Air Act (“CAA”) and under EPA’s Mandatory Reporting of Greenhouse Gases Final Rule (“GHG Reporting Rule”). We are concerned that CEQ’s repeated references to the accounting threshold established under the GHG Reporting Rule may be misinterpreted and taken out of context, either on issuance of the final guidance or at some point in the future. “Actions taken under the [CAA]” are, pursuant to statute, not “major federal actions,” and as such, are expressly exempt from the requirements of NEPA. 15 U.S.C. 793(c)(1) (Energy Supply and Environmental Coordination Act of 1974). While a conformity analysis (with an implementation plan) is required under the CAA whenever a proposed federal action could potentially interfere with the attainment of a national ambient air quality standard (“NAAQS”),<sup>3</sup> there are no NAAQS for GHG emissions, and EPA has expressly stated that it has no intent to promulgate any such standards. Thus, a CAA conformity analysis is not required for GHG emissions. Given that actions under the CAA are statutorily excluded from NEPA requirements, and there are no CAA GHG conformity requirements that would apply to other actions, no CAA threshold nor related policy rationale should have any bearing on any agency’s justification of a threshold (in CEQ’s terms, an “indicator” or “reference point”) for submission of data on GHG emissions in the context of a NEPA review.

While we do not object in concept to presumptive minimum applicability threshold(s) for the reporting and/or consideration of direct GHG emissions in a NEPA review, we believe there may be a number of appropriate presumptive thresholds across project types, and *any such threshold(s) should be established by Congress*. Moreover, we believe it is important that an agency conducting a NEPA review maintains the discretion to raise any presumptive threshold to

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<sup>2</sup> See Draft NEPA GHG Guidance at 11 (This [guidance] is not intended as a “new” component of NEPA analysis, but rather as a potentially important factor to be considered within the existing NEPA framework.).

<sup>3</sup> See 42 U.S.C. 7506 (limitations on certain Federal assistance for nonattainment areas).

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focus the review on issues that, in its opinion, warrant analysis in the context of the specific project under consideration. Thus, we firmly support CEQ's statements that any "reference point" would not, and should not, indicate "a level of GHG emissions that may significantly affect the quality of the human environment, as that term is used by NEPA;" and we agree that an action-specific analysis is required to evaluate significance under NEPA. Draft NEPA GHG Guidance at 3.

We believe that CEQ should emphasize this point further and should clearly state in its final guidance that it is not establishing a significance level for a NEPA review, nor is it setting a threshold for GHG emissions above which an Environmental Impact Statement must be prepared for a potential project. NEPA reviews take a great deal of time and already impose a significant transactional cost on the proponents of a potential project and the reviewing agency. At this moment in time, as the U.S. economy struggles to regain its footing, federal agencies should not implement unduly burdensome requirements that could chill critical investment. Therefore, we urge CEQ to remove its proposed 25,000 metric tons per year "indicator" or "reference point" for submission of data on GHG direct emissions.<sup>4</sup>

Finally, the NCC believes that CEQ should recommend in its final NEPA GHG Guidance that federal agencies consider establishing new categorical exemptions from NEPA requirements, or at a minimum, a streamlined review process, to "preclear" certain strategic energy projects and to promote the federal goals of energy conservation, efficiency and deployment of cleaner energy technologies summarized in the Draft NEPA GHG Guidance. We propose that the following types of actions should be so exempt:<sup>5</sup>

1. A major federal action that stems from exceptional federal assistance (e.g., stimulus funding), and
2. A major federal action that reduces or sequesters GHG emissions and/or improves energy efficiency (at the project or regionally<sup>6</sup>) and/or meets federal or state performance criteria.

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<sup>4</sup> Moreover, as a matter of logic, we believe that CEQ's justification for benchmarking its proposed NEPA reference point against the GHG Reporting Rule "accounting" threshold is flawed. As CEQ itself notes, the 25,000 metric tons per year reporting threshold established in the GHG Reporting Rule was selected to generate a range of data to inform the development of substantive policies – the GHG Reporting Rule itself does not impose any control or procedural policies, it is merely an accounting tool. If CEQ insists on establishing a numerical "indicator" or "reference point" in its Final NEPA GHG Guidance that mirrors some form of federal precedent on the regulation of GHG emissions from stationary sources, it would be better placed to follow the initial higher thresholds (75,000 short tons per year) and phase-in periods that EPA ultimately proposes in its final Tailoring Rule.

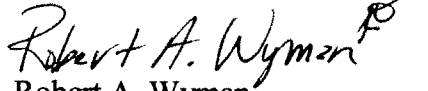
<sup>5</sup> These recommendations are similar to, and consistent with, recommendations that we made in our comments to EPA on its Proposed Tailoring Rule.

<sup>6</sup> We draw to CEQ's attention the fact that many energy and energy efficiency projects may increase GHG emissions locally but significantly reduce regional GHG emissions by creating a better balance

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The NCC appreciates the opportunity to submit these comments and looks forward to providing further input. We encourage CEQ to work with Congress and with other federal agencies towards prompt and appropriate national GHG legislation.

Best regards,



Robert A. Wyman  
of LATHAM & WATKINS LLP  
on behalf of the National Climate Coalition

cc: National Climate Coalition

**Statement regarding these comments submitted by the *National Climate Coalition*:**

*The positions described in these comments regarding CEQ's Draft NEPA GHG Guidance are intended for this context only. Different positions may be appropriate for other programs under consideration at the national, international or other (e.g., state or regional) level. Furthermore, because this proposal is an integrated package of recommendations that reconciles often conflicting individual company perspectives, no particular position should be attributed to any individual **National Climate Coalition** member. The Coalition offers these comments recognizing that CEQ will receive a variety of comments from other stakeholders. We look forward to continued dialogue with all stakeholders and commit to give serious consideration to and to comment upon constructive ideas offered by others.*

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between energy supply and use (e.g., by locating electricity generation or fuel refining closer to consumers, thus reducing transmission losses or transportation emissions) and by increasing the overall efficiency of an electricity or transportation system (e.g., through the use of cogeneration and combined heat and power). Environmental review statutes such as NEPA should not be applied so as to chill the development of such priority projects by scrutinizing only local project impacts and neglecting regional benefits. Many regionally beneficial energy and energy efficiency projects can be identified in advance by category and should be excluded from NEPA review categorically whenever possible in recognition of their material environmental and energy benefits.